

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*,

Plaintiff,

and

CITIZENS FOR A HEALTHY BAY, and
PUDGET SOUNDKEEPER ALLIANCE,

Plaintiffs,

and

PUYALLUP TRIBE OF INDIANS,

Intervenor-Plaintiffs

vs.

ELECTRON HYDRO, LLC,

Defendant.

Case No: 2:20-cv-01746-JCC

DEFENDANT'S MOTION TO STAY
DISCOVERY PENDING RESOLUTION OF
CRIMINAL PROCEEDINGS

NOTE ON MOTION CALENDAR:
February 11, 2022

This Document Relates to:
BOTH CASES

MOTION

Defendant Electron Hydro, LLC moves, pursuant to Fed. R. Civ. P. 7, for a stay of discovery in these consolidated Clean Water Act cases, consolidated under Case No. C20-1746-JCC, until the criminal charges recently filed against Electron Hydro, LLC and Thom Fischer are resolved.

1 Having conferred with Plaintiffs' counsel, Plaintiff United States has indicated it will
 2 oppose this motion. The other Plaintiffs have not indicated their position on the motion as of the
 3 time of filing.

4 **I. BASIS FOR MOTION**

5 On January 10, 2022, Washington's Attorney General filed an information in Pierce
 6 County Superior Court asserting criminal claims against Electron Hydro, LLC and a separate
 7 information asserting criminal claims against its Chief Operating Officer, Thom Fischer, based
 8 upon the alleged discharge of artificial field turf to the Puyallup River. Declaration of Svend A.
 9 Brandt-Erichsen ("Brandt-Erichsen Decl."), ¶ 2 and Exhibits 1 and 2 thereto. The supporting
 10 Affidavits of Probable Cause connect the criminal charges to the use of artificial turf in
 11 construction of a temporary bypass channel within the Puyallup River and the accidental release
 12 of turf downstream when the temporary channel's liner ruptured. Brandt-Erichsen Decl., Exs. 3
 13 and 4 at 5, 7, 8.

14 The Plaintiffs' Clean Water Act claims in the consolidated action pending before this
 15 Court also are based upon the placement of artificial turf under the liner and the release of turf
 16 when the liner ruptured. Case No. C20-1746-JCC: ECF No. 1 (Complaint of the United States
 17 of America) ¶¶ 3, 51-61, First, Second and Third Claims for Relief; ECF No. 29 (Complaint in
 18 Intervention of Communities for a Healthy Bay and Puget Soundkeeper Alliance) ¶¶ 1, 40-51,
 19 First and Second Claims for Relief; ECF No. 38 (Complaint in Intervention of Puyallup Tribe of
 20 Indians) ¶¶ 1, 47-60, First, Second and Third Claims For Relief; Case No. C21-5171-JCC
 21 (Complaint of Communities for a Healthy Bay and Puget Soundkeeper Alliance) ¶¶ 26-36.

22 Electron Hydro, LLC is the named defendant in the consolidated Clean Water Act civil
 23 suits (20-cv-1746-JCC and 21-cv-319-JCC). The suits do not currently name Thom Fischer as
 24 a defendant. However, late last year the United States informed Defendant's counsel that it
 25 intended to amend its complaint to add Thom Fischer as a defendant. Brandt-Erichsen Decl., ¶
 26 4. During the week before the criminal claims were filed, the United States had asked Electron
 27 Hydro, LLC to enter into a stipulation regarding upcoming depositions of its witnesses. Brandt-
 28

1 Erichsen Decl., ¶ 4. The U.S. sought Electron Hydro, LLC's agreement that it would not object
 2 to examination of the witnesses on issues relating to Mr. Fischer's liability as an individual. *Id.*
 3 The proposed stipulation included a recitation that the United States has prepared an amended
 4 complaint that includes Thom Fischer as an individual defendant. *Id.* Electron Hydro, LLC has
 5 not signed the proposed stipulation. *Id.* On January 26, 2022, counsel for the United States
 6 indicated they intend to file their amended complaint naming Mr. Fischer as an additional
 7 defendant within the next week. *Id.*

8 II. ARGUMENT

9 A district court has discretion to stay proceedings after weighing the competing interests
 10 that will be affected. *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163 (1936);
 11 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109-1111 (9th Cir. 2005). In particular, this Court
 12 has discretion to determine whether to stay civil litigation while similar criminal proceedings are
 13 pending so as to manage its docket in the interest of justice and efficiency. *Fed. Sav. & Loan*
 14 *Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989); *Keating v. Office of Thrift Supervision*,
 15 45 F.3d 322, 324 (9th Cir. 1995). Courts are afforded this discretion because the denial of a stay
 16 could impair a party's Fifth Amendment privilege against self-incrimination, extend criminal
 17 discovery beyond the limits set forth in Fed. R. Crim. P. 16(b), expose the defense's theory to
 18 the prosecution in advance of trial, or otherwise prejudice the criminal case. *Ashworth v. Albers*
 19 *Medical, Inc.*, 229 F.R.D. 527, 33 A.L.R.Fed.2d 681 (S.D.W. Va. 2005).

20 In determining whether to stay a civil proceeding, a district court should consider "the
 21 particular circumstances and competing interests involved in the case." *Molinaro*, 889 F.2d at
 22 902. One highly relevant consideration is the extent to which the criminal defendant's Fifth
 23 Amendment rights will be implicated by the proceeding. *Id.* This is not the sole consideration;
 24 the Court also should consider the following five factors:

25 (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any
 26 particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden
 27 which any particular aspect of the proceedings may impose on defendants; (3) the
 28 convenience of the court in the management of its cases, and the efficient use of judicial

resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Molinaro, 889 F.2d 902-03; *Keating*, 45 F.3d at 325. Courts have recognized that a stay may be favorable and in the interests of justice where a defendant has been indicted, and there is a large degree of overlap between the facts involved in the criminal and civil cases. *See ESG Capital Partners LP v. Stratos*, 22 F. Supp. 3d 1042, 1045 (C.D. Cal. 2014) (citing *Molinaro*, 889 F.2d at 903).

A. Interest of the Plaintiffs

The Court must consider the Plaintiffs' interest in the civil case's continuation and the risk of prejudice from a stay. *Molinaro*, 889 F.2d at 903. Civil plaintiffs have an interest in having a case resolved quickly. *See ESG Capital Partners*, 22 F.Supp. 3d at 1046. However, this should not be the sole deciding factor. *See U.S. v. Acquest Transit, Inc.*, 2016 WL 9526566, * 1 (W.D.N.Y. 2016) (Clean Water Act suit for civil penalties and injunctive relief stayed four years while parallel criminal case was pending). Courts typically consider whether a stay will hurt the plaintiffs' ability to present their case or prejudice the plaintiffs' ability to obtain the relief they seek, rather than focusing on the passage of time. *Keating*, 45 F.3d at 325-26 (civil charges that overlapped federal criminal indictment were severed; burden on plaintiff of proceeding to hearing on remaining civil claim outweighed by interest in speedy resolution); *Molinaro*, 889 F.2d at 903 (defendant in FSLIC civil suit continued to attempt to dispose of assets and had already given deposition testimony, making Fifth Amendment burden negligible); *F.T.C. v. J.K. Publications, Inc.*, 99 F.Supp.2d 1176 (C.D. Cal. 2000) (defendants in FTC civil suit had a history of hiding and attempting to dispose of assets and had transferred \$21 million to affiliates); *Chrome Hearts LLC v. Old School Fairfax Inc.*, (potential loss of claims against undetermined defendants justified partial rather than complete stay of discovery).

There is no issue here of plaintiffs losing claims due to the passage of time; the existing claims are expansive and the statute of limitations is not a concern, nor is there a question of identifying additional defendants. It also should be noted that the Plaintiffs have not taken a

1 single deposition to date. Discovery has been limited to document production by Electron
2 Hydro, LLC. The Plaintiffs have not acted as if there were an urgency to their claims.

3 Factors important to plaintiffs in other cases also do not come into play here. Unlike
4 *Keating*, the Plaintiffs' claims in this consolidated action share a common nucleus of facts with
5 the recently filed criminal charges. Since there have been no depositions taken in this litigation,
6 there is no question of prior waiver of Fifth Amendment rights considered important in *Molinaro*.
7 Finally, there has been no suggestion that Electron Hydro has made any effort to divert assets.

8 **B. Burden on Defendant**

9 Recognizing the burden on defendants, courts have concluded that it is appropriate to
10 stay civil proceedings while criminal claims are still at the investigation stage, where they
11 involve the same nucleus of facts. *United States v. ATP Oil & Gas Corp.*, 2013 WL 6184991
12 (E.D. Louis. 2103) (Clean Water Act suit for penalties and injunctive relief stayed at the request
13 of the U.S. until conclusion of active criminal investigation and any criminal proceedings).
14 "[T]he strongest case for deferring civil proceedings until after completion of criminal
15 proceedings is where a party under indictment for a serious offense is required to defend a civil
16 or administrative action involving the same matter." *Securities and Exchange Commission v.*
17 *Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C.Cir.1980). Here, the criminal case has
18 advanced beyond investigation and charges have been filed. The potential impacts on the
19 criminal defendants are no longer speculative; they face a real risk of prejudice to their criminal
20 defense, as the factual issues in the criminal case are entirely subsumed within the facts at issue
21 in the civil cases. This case presents the strongest circumstances justifying a stay. *See id.*

22 As noted above, the implications for Fifth Amendment rights are often a driving
23 consideration. While corporate entities like Electron Hydro, LLC do not have a Fifth
24 Amendment right against self-incrimination, *Braswell v. United States*, 487 U.S. 99, 107 (1988),
25 individuals do have that right. Courts have recognized that a stay is appropriate where a
26 corporate entity is reliant on witnesses that would assert their privilege against self-
27

1 incrimination, as this would hamper their ability to present a defense against the civil case.
 2 *Chagolla v. City of Chicago*, 529 F.Supp.2d 941 (D.Ill. 2008); *Delphi Connection Systems, LLC*
 3 *v. Koehlke Components, Inc.*, 2012 WL 12895670 (C.D.Cal. 2012); *Chrome Hearts LLC v. Old*
 4 *School Fairfax Inc.*, 2017 WL 8943005 (C.D.Cal. 2017) (partial stay of discovery).

5 Mr. Fischer is Electron Hydro, LLC's Chief Operating Officer. The centrality of Mr.
 6 Fischer's testimony to Electron Hydro, LLC's defense in these actions is demonstrated by the
 7 fact that the U.S. is weighing adding him as an individual defendant. *See* Brandt-Erichsen Decl.,
 8 ¶ 4. Moreover, should the U.S. successfully follow through on that intention, the addition of Mr.
 9 Fischer as an individual defendant in the civil action would directly implicate his Fifth
 10 Amendment right against self-incrimination.

11 There also is the question of the potential impact of civil discovery on the criminal case.
 12 Typically the concern is that criminal defendants will seek to use the broader discovery allowed
 13 in parallel civil proceedings to circumvent the limits on discovery under the civil rules. *See SEC*
 14 *v. Nicholas*, 59 F.Supp.2d 1071-72. Absent a stay, Plaintiffs could seek to limit Electron Hydro,
 15 LLC's discovery on these grounds. But more directly here, the State's Affidavits of Probable
 16 Cause demonstrate that the U.S. is sharing documents it has obtained from Electron Hydro, and
 17 presumably it would do so with deposition testimony and other discovery as well. This has the
 18 potential to give the criminal prosecutors unfair insights into defense strategies and theories, in
 19 addition to implicating Mr. Fischer's Fifth Amendment rights. *See Ashworth*, 229 F.R.D. 527.

20 **C. Interests of the Court**

21 It is a more efficient use of the Court's resources to stay the consolidated proceedings
 22 pending the outcome of the criminal matter. *See, e.g., Eggleston v. Pierce County*, 99 F.Supp.2d
 23 1280, 1282 (W.D.Wn. 2000) (plaintiffs civil claim related to search stayed pending outcome of
 24 state court appeal of conviction that resulted from search). Allowing criminal and civil
 25 proceedings that involve the same nucleus of operative facts to proceed simultaneously is a waste
 26 of judicial resources. *See In re Adelpia Communications Securities Litigation*, 2003 WL
 27 22358819 (E.D. Pa. 2003). It also would not make sense to take an intermediate step of staying
 28

claims related to the artificial turf while allowing other Clean Water Act claims to proceed, as that would necessarily result in duplicative proceedings. Likewise, it would be inappropriate to stay claims only as against Mr. Fischer (assuming he is added as a defendant by the U.S.), as the claims against him and Electron Hydro, LLC would be fully intertwined. *See Nicholas*, 569 F.Supp.2d at 1072 (responding to motion to stay as to two individuals, court stayed entire case as “dual litigation does not serve the interests of efficiency or judicial economy”); *Delphi Connection Systems, Inc.* 2012 WL 12895670, *8 (claims against company stayed following decision to stay claims against individual).

D. The Public Interest

The public interest in law enforcement efforts through criminal investigation and prosecution of alleged wrongdoing is substantial. *See ATP Oil & Gas Corp.*, 2013 WL 6184991, * 4. Indeed, the public interest is furthered by a stay because “the public’s interest in the integrity of the criminal case is entitled to precedence over the civil litigant.” *Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 75 (W.D.N.Y. 2003); *Jones v. Conte*, 2005 WL 1287017, *2 (N.D.Cal 2005).

III. CONCLUSION

For the foregoing reasons, Defendant Electron Hydro, LLC respectfully urges the Court to stay discovery in this consolidated action pending resolution of the criminal claims filed against Electron Hydro, LLC and Thom Fischer.

Dated: January 27, 2022

NOSSAMAN LLP

By: /s/ Svend Brandt-Erichsen
Svend Brandt-Erichsen, WSBA # 23923
Nossaman LLP
719 Second Avenue, Suite 1200
Seattle, WA 98104
(206) 395-7630
sbrandterichsen@nossaman.com

Attorney for Defendant, Electron Hydro, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2022, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

s/ Svend Brandt-Erichsen

Svend A. Brandt-Erichsen